

Modernisation in Continuity. Ernst-Wolfgang Böckenförde's most famous ideas and the Depolarization Paradox in Representative Democracy*

Gertrude Lübke-Wolff

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The „Chain of Legitimation“

Ernst-Wolfgang Böckenförde's concept of a „chain of legitimation“ has become a central element in the construction and legal understanding of German democracy. He was not the one who invented the term or the concept, nor the one who, as a judge, introduced it into the case-law of the German Federal Constitutional Court (FCC). In the case-law of the court, the term „chain of legitimation“ first appears in a decision of December 1974, long before Böckenförde became a member of the court ([BVerfGE 38, 258, 275](#), cf. also [BVerfGE 47, 253, 275](#): „uninterrupted“ chain of legitimation required; [BVerfGE 52, 95, 121](#)). Much earlier, Ulrich Scheuner had mentioned the „chain of legitimation running from the people via parliament to the government“ in a discussion remark at the [1957 conference of the German Association of Public Law Scholars](#). Böckenförde had postulated an “uninterrupted democratic chain of legitimation” in his book [Verfassungsfragen der Richterwahl](#) (p., 73 f.). In elaborating that postulate,¹⁾ Cf., e.g., Böckenförde, Demokratie als Verfassungsprinzip, in: Josef Isensee/Paul Kirchhof (eds.), Handbuch des Staatsrechts, Vol. II, C.F Müller, 2004, § 24, 429, 436 ff., paras. 11 ff. he often referred to Roman Herzogs [Allgemeine Staatslehre](#) of 1971 or Herzogs commentary on Art. 20 of the Basic law. The idea that legitimacy can only be conveyed via an uninterrupted chain of legitimation was probably borrowed from the law of negotiable instruments, where the requirement that a series of endorsements must be uninterrupted to transfer the entitlement had long since been circumscribed as demanding an uninterrupted chain of legitimation.

During Böckenförde's term on the court, the FCC has eventually adopted a refined standard of democratic legitimation of public authority, distinguishing different types of legitimation and their interplay, with the idea of a [chain of legitimation as a central element](#). There is no doubt about Böckenförde's intellectual influence on the court, here, even though [recent decisions](#) have interpreted that standard somewhat less strictly than Böckenförde may have had in mind.

Obviously, the chain has not been working in the way it is supposed to for quite some time. In Germany as elsewhere, trust in democratic institutions has been declining over recent decades. Democracy is in decay in some countries where populist parties have taken over, and more or less at risk in some others.

As a remedy, bestsellers books advise us to stop voting and rely on [decision-makers drawn by lot](#) instead, or to resort to „[expertocracy](#)“, and a [German habilitation thesis](#) suggests that any nexus between voters on the one hand and elected members of parliament on the other ought to be severed in order to set the latter free to pursue the good and the true instead of base voter interests. The idea that elections and other concatenated ties of responsibility must link the exercise of public power to the will and the interests of those in whom that power ultimately resides, and the underlying commonsensical notions of how principal-agent-relationships must be institutionalised if they are to work in the interest of the principal, is apparently on the retreat even among political scientists and constitutional lawyers.

The current surge of populist movements, the anti-democratic reflections of a widespread feeling that something is going fundamentally wrong (even) in democratic societies – are they symptoms of fundamental deficits in representative democracy? Can Böckenförde's theory of democracy help us understand what is going on?

The requirement of an uninterrupted chain of legitimation was put to the front by Böckenförde in response to claims that had become popular in the 1968 student movement and its aftermath. All organizations and organizational units within society, that claim went, must work like democracies in their own right, with the majority of their members – students in universities, employees in private enterprise and state agencies, etc. – determining the course of action. With respect to institutions exercising public power, the requirement of an uninterrupted chain of legitimation linking all exercise of public power to the people as a whole rejected that claim. It denied, as a matter of constitutional law, the idea that the most democratic state of affairs is one with all kinds of internal spin-off democracies. The point of the chain-concept was to establish pervasive democratic control by the people as a whole, as opposed to fragmented group control, as a core concept of the constitutional principle of democracy. A characteristic FCC decision reflecting Böckenförde's view on the matter is [BVerfGE 93, 37, 66 ff.](#), according to which the principle of democracy sets limits to employee participation in the management of public administration. Böckenförde highlights the importance of contemporary conflicts over the relevant understanding of democracy where he mentions that one of the reasons why as a candidate for a judgeship on the FCC, he, a Social Democrat, had been welcome to the Christian Democrats was his opposition to “total democratization” (an amazing terminological concession to his opponents' claim that what they advocated was more democratic).²⁾ [Biographical Interview](#), conducted by Dieter Gosewinkel, 369, 388; for Böckenförde's approach to the more general question of the reach of the principle of democracy, see Böckenförde, [Die Bedeutung der Unterscheidung von Staat und Gesellschaft im demokratischen Sozialstaat der Gegenwart](#), 209, 225 ff.

In its function as a limit to group and organizational aspirations to compartmentalized collective self-determination, the requirement of an uninterrupted chain of legitimacy connecting any exercise of public power to the citizenry as a whole is inextricably linked to Böckenförde's idea of the state as the institution with an overall responsibility for the common weal – overall responsibility of course not in the sense

that governmental tasks and powers must be unlimited or unorganized, but in the sense that as far as public power goes in a liberal democracy under the rule of law, it must not be dissipated, it must not be fragmented in a way that will make it ineffective. In Böckenförde's view, only overreaching power and responsibility enable the state to accommodate all the disparate interests within a society and perform its integrative task by setting limits to market forces and seeing to it that inequalities do not mount up boundlessly as they would in a free market without corrective intervention. This idea has guided Böckenförde's analyses of the problems created by the dismantling of state powers in the process of Globalization and Europeanization.³⁾ See [Böckenförde, The Future of Political Autonomy: Democracy and Statehood in a time of Globalization, Europeanization, and Individualization \[1998\]](#), 325, 340 ff.; id., [Which Path is Europe Taking? \[1997\]](#), 343, 347 ff., 350 ff., 363 ff. In these analyses, explanations for much of the current trouble – including the economic and political problems arising from the European Monetary Union and, more generally, from the strategy of enforcing political union via market integration – can be found.

Böckenförde's Dictum and the Postulate of Homogeneity

With much of his work, Böckenförde addressed the qualms which Catholics had about liberal, secular democracy. He successfully offered views that helped to fulfil a conciliatory mission. Like any successful mediation, this one, too, met the convincees where they were.

The most prominent example is Böckenförde's famous *dictum* according to which the liberal, secular state „lives by prerequisites which it cannot itself guarantee“. This, Böckenförde explains, is the „great venture“ (*das große Wagnis*) it has undertaken for freedom's sake.⁴⁾ [Böckenförde, Die Entstehung des Staates als Vorgang der Säkularisation](#), 112 (my translations). What Böckenförde addresses here is not the trivial fact that neither persons nor societal entities ever have full control of the prerequisites of their persistence. The point of the *dictum* is that the liberal, secular state is prevented by its very essence, by its defining characteristics, from prescribing and enforcing the convictions on which it hinges. To inveterate adherents of liberal democracy, Böckenförde's qualification of liberal, secular democracy as a venturesome undertaking may sound like a warning that health is risky because it might deteriorate to illness. For the Catholic *milieu* of which [Böckenförde himself was part](#), however, the avowal conceding that a political system renouncing imperative divine guidance in politics is a venture without backstop was a familiar starting point. It served as the basis for Böckenförde's concept of liberal democracy as an enterprise that needs common ethical ground and where religion still has a part to play.⁵⁾ [Böckenförde, Die Entstehung des Staates als Vorgang der Säkularisation \[1967\]](#), 229, 230; . Cf. also id., [Der säkularisierte Staat](#), S. 16 ff., 24.; for the (limited) „directive power“ (*potestas directiva*) of the Catholic church vis-à-vis Catholic believers id., [So ist Autonomie nicht gemeint \(Frankfurter Allgemeine Zeitung\)](#).

– a concept that ridded liberal democracy of its Kelsenian handicap, i.e. of the perception that it is for relativists only.

Böckenförde's related claim, prominently adopted in the FCC's [Maastricht judgment](#), that liberal, secular democracy must rely on some kind of homogeneity, which referred to no more than the common ethical ground just mentioned, and a tie of collective identity („commonality“, „us-consciousness“)⁶⁾ See, e.g., Böckenförde, [Politische Theorie und Politische Theologie \(1983\)](#), 330 ff., is another instance of Böckenfördean modernization in continuity. Whatever the explanatory power of the doctrine⁷⁾ For a skeptical assessment according to which, in the very thin meaning in which the doctrine is acceptable, it is practically tautological, see Lübke-Wolff, [Homogenes Volk. Über Homogenitätspostulate und Integration.](#), it was certainly most efficient as an instrument of doctrinal transition from a religious worldview that was not compatible with democracy to one that was, i.e. as a tool of ideological modernization in continuity. The Catholic idea of concordia (concord, harmony) as a necessary basis of community,⁸⁾ Gertrude Lübke-Wolff, *Das Prinzip der praktischen Konkordanz*, in: Dirk Herrmann / Achim Krämer (eds.), *Festschrift für Christian Kirchberg*, Boorberg. 2017, 143, 144 f, with further references. originally aimed at unity in faith, was not only transcended, but preserved, howsoever diffuse its new content.

Tides of polarization

The liberal, secular democracy so convincingly advocated by Böckenförde not only requires civic loyalty. It should also help to produce such loyalty, help to turn enemies into participants in peaceful political competition, help to deconstruct be-all-and-end-all ideologies and replace them by pragmatic search for best solutions and compromise. As a matter of fact, however, what we have seen in post-World-War-II democracies are tides of depolarisation and repolarisation.

In Germany and other European countries, the political left-right-polarisation which had intensified with the so-called movement of 1968, and which had absorbed or otherwise superseded the remnants of earlier ideological cleavages, faded away in the period following the breakdown of the soviet-communist bloc regimes. In recent years, however, not just in Germany, but all over Europe, polarisation has been on the rise again. The tidal currents are not synchronized all over – in the US, the temporal cycle has been somewhat different from that in Europe. Conditions are not everywhere the same, and it may take different amounts of time in different periods and places for undercurrents of discontent to surface in a new tidal wave of polarisation. At any rate, representative democracy seems less able to stabilize states of depolarization once achieved than one would expect in view of the legitimising functions ascribed to it.

The depolarization paradox

I would suggest that this can be explained by, *inter alia*, a paradoxical, dysfunctional side effect of depolarisation.

Big ideological complexes that typically go along with political polarisation, full monty worldviews offering comprehensive interpretation and guidance, tend to be less open to democratic negotiation and compromise than more fragmented and pragmatic convictions. In that respect, depolarisation and the civilization of worldviews that Böckenförde's theory is concerned with facilitate the functioning of representative democracy. Conversely, it would seem that, the better representative democracy works, the more it will, in turn, contribute to depolarisation.

But there is a flipside to the beneficial effects of depolarisation. Polarisation makes it easier to identify the political party that will serve your preferences. With depolarisation, by contrast, it becomes increasingly difficult for political parties and governments to develop and implement programs that will, in essence, match the preferences of voters. All they can offer is tied-up political packages with mixed contents. No one would accept the equivalent in a grocery store. We would hate it if only various shopping bags pre-filled by someone else were available, but as customer-kings of representative democracy, we have to put up with a pre-packaged political parcel, often repacked in coalition negotiations, for the next couple of years. The lesser the degree of political polarisation, the more this is likely to produce tedium and aversion with the packages on sale as well as with the salesmanship of those who bargain over how to pack them and how to keep them distinguishable from other offers in supply. At advanced stages of depolarization, efforts to sell these party-political packages as products of a coherent political idea are bound to become utterly unconvincing. At that stage, sharper ideological distinctions, i.e. more polarization, will be called for, and with a sufficient basis in more substantive discontent, it is likely to come. Of course, polarization is not to be advised as a remedy. It is bad medicine. Well-designed elements of direct democracy would seem much better tailored to the problem. Polarization may, however, at high costs, help restore voter satisfaction with what their electoral vote can achieve or prevent. The current rise in voter turnout indicates such an effect. The recent federal election in Germany, with the populist AfD (*Alternative für Deutschland*) in contention, has brought millions of former non-voters back to the polls.

The paradoxical potential of depolarization in representative democracy is obviously not the only factor, and certainly not even the most important one, explaining the frustration with the political system that is actually virulent in Western democracies. Experiences and expectations of individual and/or collective advancement or decline, economic and other, count for much more. For a better understanding of why western democracies have underperformed on that score in recent decades, reading Böckenförde is instructive in several respects. His explanation of the problems related to economic transnationalisation and the reduction of public power to frame market forces and readjust their distributional effects that goes along with it have already been mentioned. The underlying analyses of equality issues can be read as modern theoretical foundations of the "social state" (Sozialstaat).⁹⁾ For Böckenförde's

reception of the classical German writer advocating a social state, Lorenz von Stein, see Böckenförde, [Lorenz von Stein als Theoretiker der Bewegung von Staat und Gesellschaft zum Sozialstaat](#). They include accounts of how equal liberties necessarily produce inequalities, of social prerequisites of meaningful liberty, and of what follows from this for the role of government in a democracy aiming at self-determination which is “substantive” rather than just formally guaranteed on paper (or, to put it in more Anglo-Saxon terms: aiming at liberty in action rather than just liberty in the books). What follows is the never-ending need for readjusting governmental action to prevent – in a way that is compatible with liberal principles – social inequality from undermining the basis of liberty and self-determination, and for rules preventing economic status from translating into political power.¹⁰⁾ See Böckenförde, [Protection of Liberty Against Societal Power \[1975\]](#); id. (with Christoph Enders), [Freiheit und Recht, Freiheit und Staat](#), 42, 49 ff., 53 ff.; cf. also id., in: [Biographical Interview](#), 377 ff., 405 f. Böckenförde has also addressed the risks inherent in the increasing fragmentation of arenas of communication.¹¹⁾ [Böckenförde, The Future of Political Autonomy](#), 338. To see this problem, he did not have to wait for the web-based filter bubbles which many see as threats to democracy today. It was enough to witness the fragmentation of earlier audiovisual media, and in particular the privatization of TV broadcasting (which, in Germany, had been exclusively public as long as the limited availability of transmit frequencies did not allow for plural private supply). It is important to remember these and other earlier origins of communicative fragmentation in order to realize that the related losses of common ground and of adequate perception of realities are not just problems of certain subcultures of people who never leave their social media filter bubbles, but problems of society as a whole, including the so-called elites.

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References

- 1. Cf., e.g., Böckenförde, Demokratie als Verfassungsprinzip, in: Josef Isensee/ Paul Kirchhof (eds.), Handbuch des Staatsrechts, Vol. II, C.F Müller, 2004, § 24, 429, 436 ff., paras. 11 ff.
- 2. Biographical Interview, conducted by Dieter Gosewinkel, 369, 388; for Böckenförde’s approach to the more general question of the reach of the principle of democracy, see Böckenförde, Die Bedeutung der Unterscheidung von Staat und Gesellschaft im demokratischen Sozialstaat der Gegenwart, 209, 225 ff.
- 3. See Böckenförde, The Future of Political Autonomy: Democracy and Statehood in a time of Globalization, Europeanization, and Individualization [1998], 325, 340 ff.; id., Which Path is Europe Taking? [1997], 343, 347 ff., 350 ff., 363 ff.
- 4. Böckenförde, Die Entstehung des Staates als Vorgang der Säkularisation, 112 (my translations).

- 5. Böckenförde, Die Entstehung des Staates als Vorgang der Säkularisation [1967], 229, 230; . Cf. also id., Der säkularisierte Staat, S. 16 ff., 24.; for the (limited) „directive power“ (potestas directiva) of the Catholic church vis-à-vis Catholic believers id., So ist Autonomie nicht gemeint (Frankfurter Allgemeine Zeitung).
- 6. See, e.g., Böckenförde, Politische Theorie und Politische Theologie (1983), 330 ff.
- 7. For a skeptical assessment according to which, in the very thin meaning in which the doctrine is acceptable, it is practically tautological, see Lübbe-Wolff, Homogenes Volk. Über Homogenitätspostulate und Integration.
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- 9. For Böckenförde's reception of the classical German writer advocating a social state, Lorenz von Stein, see Böckenförde, Lorenz von Stein als Theoretiker der Bewegung von Staat und Gesellschaft zum Sozialstaat.
- 10. See Böckenförde, Protection of Liberty Against Societal Power [1975]; id. (with Christoph Enders), Freiheit und Recht, Freiheit und Staat, 42, 49 ff., 53 ff.; cf. also id., in: Biographical Interview, 377 ff., 405 f.
- 11. Böckenförde, The Future of Political Autonomy, 338.

